Supreme Court, U.S.
FILED
NOV 18 1992
OFFICE OF THE CLERK

No 91-2024

IN THE

Supreme Court of the United States

October Term, 1992.

LAMB'S CHAPEL, et al.,

Appellants.

v.

CENTER MORICHES
UNION FREE SCHOOL DISTRICT,et al.,

Appellees.

On Appeal From The United States Court
of Appeals For The Second Circuit

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

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BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

This case presents significant questions as to the equal protection before the law of religious persons and groups who desire to exercise First Amendment rights on an equal basis with other citizens on public school property generally open for free expression. The New York state and local school board policies that deny access to public school facilities for religious "purposes" constitute content-based invidious discrimination which, if sustained, will create a *religious apartheid* not unlike the Jim Crow laws that denied blacks the equal use of public facilities because of race. This Court should reject any arguments or purported constitutional doctrine that would sanction such a policy.

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Amicus Curiae — The Rutherford Institute — has as one of its principal purposes the advancement of free speech and the elimination of discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented by this case is not only important to the jurisprudence of the First Amendment, it is vital to the welfare of the Nation and the rights and freedoms of citizens in society.

Amicus Curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With its international office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in most of the 50 states and to participate in significant cases relating to the Free Speech and the Religion Clauses. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

This case presents issues of paramount public importance. Lamb's Chapel and its pastor have been denied access during nonschool hours to public school facilities solely because of the religious content of their film series, "Turn Your Heart Toward Home." This denial has occurred even though the facilities are open to other citizens for assembly and speech purposes subject only to reasonable time, place and manner regulations. It is not hyperbole to label this subtle, but nevertheless invidious, policy as effecting a form of *religious apartheid* — a policy that separates and excludes citizens from the use of public facilities because of adherence to religion. This policy is not only *not* required by the Constitution, it is violative of precious, two-hundred-year-old freedoms granted by the First Amendment Free Speech and Religion Clauses, as reinforced by the Fourteenth Amendment Equal Protection Clause.

The unequal differentiation and exclusion of persons who desire to meet and express themselves on religious subjects is in its effect more severe than the *Plessy v. Ferguson*[2] "separate but equal" doctrine. The New York policy does not merely derogate religious persons to second class facilities, it accomplishes a total and complete exclusion from *all* publicly available school facilities — a virtual shutout of persons who wish to meet for religious purposes. And, unlike *Plessy*, the policy affords such persons *no* alternate "equal but separate accommodations" to meet and express themselves in the manner afforded to other citizens.

The reasoning of the Second Circuit Court of Appeals justifying the exclusion in this case is ill-conceived. Its rationale for decision is one of its own creation, supported only by its similarly ill-conceived precedents, and not by any decision of this Court. While this Court has permitted government to limit the use of publicly-owned facilities for speech purposes and to define what uses are permitted, it has never, *never* empowered government to declare a wholesale ban on speech in an open forum based solely on content without demonstrating a compelling state interest. And even then, any restriction of speech must be narrowly tailored and ample alternative opportunities for expression must otherwise be provided. *Perry Education Association v. Perry Local Educators' Association*, 460 U. S. 37, 45 (1983).

Departing from this approach, the Second Circuit has crafted a circular, outcome-oriented hybrid, what it calls the sub-category of the "limited" public forum. This hybrid would permit government to ban and exclude certain subject matter from otherwise open forums, notwithstanding the government's policy or practice vis-a-vis speech of similar content or the nature of the forum or the compatibility of the excluded speech with speech that is permitted. Under the Second Circuit's logic,

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[2] 163 U.S. 537 (1896).

"property remains a *nonpublic* forum as to all unspecified uses, . . . and exclusion of uses — even if based upon subject matter or the speaker's identity — need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679-80 (2d Cir. 1988) (emphasis added). But, as one court has said, "government property. . . does not automatically cease to be a designated public forum because the government restricts *some* speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction. The Supreme Court has not adopted such circular reasoning." *Hays County Guardian v. Supple*, 1992 U. S. App. LEXIS 18167 (5th Cir. August 10, 1992) (emphasis added).

Under the Second Circuit's approach, not only would the Free Speech Clause be defined away by the simplest grant or denial of access, government would be licensed in the process to favor or disfavor the content and form of expression. Meanwhile, fellow citizens would be unequally deprived of substantial associational and expressive liberties guaranteed by the Bill of Rights and the Civil War Amendments, and the liberties all citizens enjoy would be greatly diminished.

ARGUMENT

I. THE NEW YORK STATE AND CENTER MORICHES SCHOOL BOARD FACILITIES USE POLICIES PROMOTE A FORM OF RELIGIOUS APARTHEID, PERMITTING GOVERNMENT SYSTEMATICALLY TO DISENFRANCHISE AND EXCLUDE RELIGIOUS PERSONS FROM THE PUBLIC SQUARE.

Section 414 of the New York Education Law sets out ten purposes for which schoolhouse facilities may be used

throughout the State of New York. These purposes were summarized by the Second Circuit as follows:

> instruction; public library purposes; social, civic and recreational meetings; events for which admission fees are charged, if the fees are to be applied to educational and charitable (but not religious) purposes; elections and political meetings; civic forums and community centers; classes for mentally retarded minors; recreation and athletics; child care services during non-school hours; and graduation exercises held by not-for-profit elementary and secondary schools, provided no religious service is performed.

Lamb's Chapel v. Center Moriches Un. Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992) ("*Lamb's Chapel*").[3] The Center Moriches School Board has implemented this State policy by declaring that "[t]he school premises shall not be used by any group for religious purposes." *Id.* The issue is thus the constitutionality validity of (1) a state statute that has been judicially construed as banning the use of school facilities for religious purposes, and (2) an express policy of the Center Moriches school board which explicitly reaffirms that ban. In the latter instance, the law prohibits on its face the use of school facilities based on the *content* or *subject matter* of the anticipated expression, while permitting use for other purposes based on the content or subject matter of expression associated with those uses.

"'[W]here the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification."[4]

[3] Religious meetings apparently are not "social" or "civic" meetings or forums. The Second Circuit has indicated that the failure of Section 414 to specify religious uses means that such uses are excluded, *citing Treitley v. Board of Educ.*, 409 N.Y.S.2d 912, 915 (4th Dep't 1978). *Id.* at 387.

[4] *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n.8 (1976), *quoted in Widmar v. Vincent*, 454 U. S. 263, 268 (1981).

This is because "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. ISKCON*, 452 U. S. 640, 655 (1981), *quoting Kovacs v. Cooper*, 336 U. S. 77, 87 (1949). This right cannot be more paramount than when government opens up public facilities for the use of its citizenry and then selectively restricts access to those facilities to other citizens based on the "purposes" for which a facility is to be used.

The school board's denial of access of otherwise available public facilities for certain "uses" has a superficial content neutral ring to it. In support of this approach, the Second Circuit has opined that where a school district creates a "limited" public forum, "property remains a *nonpublic* forum as to all unspecified uses, . . . and exclusion of uses — even if based upon subject matter or the speaker's identity — need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679-80 (2d Cir. 1988) (emphasis added).

The language of the school board's policy expressly proscribes "uses" for religious "purposes." By definition, "use" means the carrying out of a "purpose" and "purpose" means "something set up as an object or end to be attained." *Webster's Seventh New Collegiate Dictionary*, 694, 978 (1971). Here, the "object" of the meeting or gathering on public property cannot be readily separated from the content or subject matter of the meeting or gathering that is scheduled to occur. Thus, a statute permitting government to deny access for meetings based on their "purpose," in effect, permits government to ban expression based on the content or subject matter that is expected to occur at the meeting.

The ban or exclusion of persons from public property based on "use" related to "purpose" also inexorably requires choice by government with respect to the "preferred" permitted speech.

R.A.V. v. St. Paul, ___ U.S. ___, 112 S.Ct. 2538 (1992). In the case of the ban on the use of public school facilities for religious purposes, it is as though government had endorsed nonreligion in general as the preferred viewpoint, approving only secular topics as legitimate for propagation on public property that is otherwise open for expression. By denying facilities because of "uses" for religious "purposes", religious persons and groups are disadvantaged if not stigmatized as second class citizens in the community. The level playing field of the public forum is thus unfairly imbalanced against the religious message. To paraphrase Justice O'Connor in a related context, New York's policy "conveys a message to [religious persons] that they are...not full members of the political community, and an accompanying message to [nonreligious persons] that they are...favored members of the political community." *County of Allegheny v. American Civil Liberties Union*, 492 U. S. 573, 109 S.Ct. 3086, 3118 (1989). The New York policy disqualifies religious persons from the public arena, creates an inferior class of citizenry, and brands religious views as suspect and disfavored by government.

It is thus not hyperbole to declare that the New York's policy, if sustained, will effect *religious apartheid* — an official government policy excluding religious persons from the use of otherwise available public property. The exclusion of blacks from privately-owned lunch counters, or their relegation to the back of the bus is tame compared to this New York policy which contains a wholesale ban and outright exclusion from *public* facilities based on the content of the message. The *Plessy v. Ferguson* "separate but equal" doctrine, though broader in reach, pales in light of a government policy that effects "total exclusion and total inequality" — disabling the speech of religious citizens and disenfranchising them from an important part of the public arena. In a democratic society *all* citizens should have an equal right to pursue and advocate their views in the public square so long as those views are not plainly

incompatible with the nature of the forum and the other speech activities that occur there. This Court should, in its review of this case, adhere to the high standards it has traditionally required of government to justify restrictions which interfere with speech based on the content of the message or other historically "suspect" classifications that discriminate against religious minorities as between religion and nonreligion.

II. THE NEW YORK PUBLIC SCHOOL FACILITIES USE POLICIES DRAW DISTINCTIONS BASED ON THE CONTENT OF SPEECH AND MUST BE ADJUDICATED UNDER THE COMPELLING STATE INTEREST/STRICT SCRUTINY STANDARD.

Flat bans directly excluding protected expression have rarely survived strict judicial scrutiny.[5] And even bans on what is frequently viewed as less protected "commercial speech" routinely fail under close constitutional review.[6] Where protected expression is concerned, citizens can be excluded from open forums "*only* when the exclusion is *necessary* to serve a compelling state interest and the exclusion is *narrowly drawn*

[5] *Bigelow v. Virginia*, 421 U. S. 809, 822 (1975) (ban on abortion ads); *Widmar v. Vincent*, 454 U. S. 263, 270 n. 7 (1981) (ban on religious speech on college campus); *cf. Schad v. Ephraim*, 452 U. S. 61 (1981) (township-wide ban on live entertainment invalid for substantial overbreadth); *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 636-637 (1980) (ban on door-to-door canvassing substantially overbroad and invalid because "a direct and substantial limitation on protected activity...cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect" and which cannot "be better served by measures less intrusive than a direct prohibition...").

[6] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) (striking down a state ban on drug price advertisement); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530 (1980) (striking down ban on utility bill inserts on controversial topics); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U. S. 557 (1980) (striking down ban on promotional displays); *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60 (1983), (striking down ban on condom advertisements).

to achieve that interest." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U. S. 788, 800 (1985)(emphasis added); *Widmar v. Vincent*, 454 U. S. 263, 267-270 (1981); *United States v. Grace*, 461 U. S. 171, 177 (1983); *Cohen v. California*, 403 U. S. 15, 26 (1971). And even if a particular state interest is deemed to be "compelling," there are countervailing constitutional principles, including Free Speech, Free Exercise and Fourteenth Amendment Equal Protection interests that may nevertheless render it insufficiently compelling to override and counterbalance the constitutional interests in question.[7] "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State*, 308 U. S. 147, 161 (1939).

There can be little question that the Lamb's Chapel film series, "Turn Your Heart Toward Home," is pure speech protected by the First Amendment. Even if the film's contents were exclusively religious, this Court has expressly indicated that religious expression — including religious worship and Bible study — enjoys the same protection as "political" or "ideological" or other speech under the First Amendment. *See Widmar v. Vincent*, 454 U. S. 263, 269 (1981).[8] Since the State of New York has opened up public school facilities to a multitude of "uses," the applicable standard of review as to the forum

[7] *See*, **for Free Speech interests**: *Bigelow v. Virginia*, 421 U. S. 809, 822 (1975); *Widmar v. Vincent*, 454 U. S. 263, 270 n. 7 (1981); *cf. Roberts v. Jaycees*, 468 U. S. 609 (1984); **for Free Exercise interests:** *Wisconsin v. Yoder*, 406 U. S. 205 (1972); and **for Equal Protection interests:** *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

[8] *Cf. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1911) (nude dancing) (plurality opinion); *Texas v. Johnson*, 109 S.Ct. 2533 (1989) (flag burning); *Spence v. Washington*, 418 U. S. 405 (1974) (flag burning); *Tinker v. Des Moines School District*, 393 U. S. 503 (1969) (black arm bands in school).

status of the public school property must be the "designated" public forum standard where:

> [T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

Cornelius v. NAACP Legal Defense and Education Fund, 473 U. S. 788, 802 (1985).

In determining the government's policy and practice, it is necessary to review the facts peculiar to the case at hand.[9] Here, the State of New York has opened school facilities to be used for at least ten categories of "purposes" which include "social," "civic," "recreational," "elections," "political meetings," "civic forums," "instruction," "community centers," and other activities. These categories include virtually the entire universe of expression and seem to exclude *only* commercial and profit-oriented activities and, as interpreted by the New York courts, "religious" activities, which apparently do not fall under permitted "social" or "civic" purposes. The state and local policies thus effect a blatant exclusion from the use of otherwise available public facilities based on the religious content of the anticipated subject matter of the meeting. Moreover, the prohibition, in effect, classifies groups and people differently based on the content of the message they wish to advance or the purpose for which permission to meet is sought.

[9] *See Widmar v. Vincent*, 454 U. S. 263 (1981) (university campus); *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting) and *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975) (municipal auditorium); *Board of Airport Commissioners v. Jews for Jesus*, Inc., 107 S.Ct. 2568 (1987) (airport terminal); *Lee v. International Society for Krishna Consciousness*, ___ U. S. ___, 112 S.Ct. 2709 (1992).

A. THE PROBLEM WITH THE SECOND CIRCUIT'S DEFECTIVE CONTENT-BASED ANALYSIS.

The Second Circuit abandons the traditional "designated" public forum analysis in this case and substitutes in its place what it terms as "the subcategory of 'limited public forum,' the classification that allows [school property] to remain non-public except as to specified uses." 959 F.2d at 386, *citing Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988). Relying on *Deeper Life* progency, it asserts that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir. 1991). Thus, in the name of "uses" and "genres," government can literally determine the constitutional standard by which its exclusion of speech will be judged. If a certain "use" or "genre" is prohibited on the property, that exclusion by definition is subject only to review under a reasonableness and non-viewpoint discrimination standard. If the use or genre is permitted, on the other hand, then any exclusion within the permitted use is subject to the higher compelling state interest standard, narrow-tailoring, and the availability of ample alternatives.

The rubric of "use," "purpose" and "genre" is "word play" (*R.A.V. v. St. Paul*, 112 S.Ct. at 2548) employed to circumvent this Court's proscriptions against content based discrimination and to deny citizens equal access to public property. Notwithstanding the mask of rhetoric, the facial distinctions drawn by the policy among "purposes" effects a total ban on religious expression in public school facilities, the type of content-based ban that has previously been held unequivocally unconstitutional in *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); and *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992).

The fallacy of the Second Circuit's reasoning has been exposed by the reasoning of decisions from other Circuits. For example, the Third Circuit has criticized such an analysis as permitting government "upon the most tenuous and internally inconsistent grounds, [to] pick and choose those to whom it grants access for expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable." *Gregoire v. Centennial School District*, 907 F.2d 1366, 1378 (3d Cir. 1990). And the Fifth Circuit recently pointed out in a case involving "access" to a purportedly "closed" university campus that:

> Government property... does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction. The Supreme Court has not adopted such circular reasoning.

Hays County Guardian v. Supple, 1992 U. S. App. LEXIS 18167 (5th Cir. August 10, 1992). Content-based restrictions of the type found here, no matter what rhetorical disguise they may take, cannot be justified except upon a showing of a compelling state interest. As this Court stated in the case of *R.A.V. v. St. Paul, supra*, at 4671:

> The First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects. . . . The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.[10]

[10] *See also The UWM Post, Inc. v. Board of Regents*, 774 F.Supp. 1163 (E.D. Wisc. 1991) (University hate crimes regulation overbroad and vague).

B. THE APPLICABLE PUBLIC FORUM STANDARD.

In "designated" or "limited" public forum cases, the government's intent in opening a forum is to be measured against its "policy," its "practice," the "nature of the forum" and "the compatibility of the speech with the other speech that is to occur in the forum." *Cornelius*, 473 U.S. 788, 800 (1985). These factors go beyond the facial distinctions drawn by the statute and require a review of what speech is and has been permitted in the forum, the nature of the forum and the compatibility of the speech in question with the other permitted speech.

1. The Policy.

Under the New York statute, virtually the entire universe of speech *is* permitted in public school facilities. The *only* evident exclusions are commercial or profit-oriented speech (for which there is ample constitutional doctrine to justify greater regulation) and religious speech, an entire subject matter that unlike commercial speech enjoys the highest level of constitutional protection. The government's policy on its face thus *opens* the forum to virtually all speech, but subjects religious speech to unique disabilities.

2. The School Board's Practice.

The Center Moriches school board found that the film series "Turn Your Heart Toward Home" had religious content that transgressed its policy, but nevertheless permitted a Salvation Army Benefit Band Concert, a Southern Harmonizer's Gospel Music Concert, and a program on "Psychology and the Unknown." The length to which the Second Circuit parses the Salvation Army and Gospel Music programs to *deny* their religiosity is in stark contrast to its summary acceptance of the School Board's suspicion that "Turn Your Heart Toward Home," "would have religious connotations" and "appear[ed] to be church related . . ." *Lamb's Chapel*, 959 F.2d at 384. As

a matter of practice, the record shows — notwithstanding the nuances the Second Circuit purports to divine between the "Turn Your Heart Toward Home" family movie series and these other gospel music or "New Age" programs — that the school board opened public school facilities to *multiple* programs with a religious content and purpose.

3. The Nature of the Forum and The Compatibility of the Speech With the Forum.

It has been recognized that "[c]onsideration of a forum's *special attributes* is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic *nature* and *function* of the particular forum involved." *Lee v. ISKCON*, ____ U. S. ____, 112 S.Ct. 2709, 2712 (1992) (O'Connor, J. concerning) (citations omitted; emphasis added). The forum here is an off-hours school facility that is available for use generally by the community. The forum is *not* physically limited like a jail[11] or a military base[12], nor is it the subject of private speech offered concurrently with governmental use, for example, like speech offered in a comment period before a school board meeting[13], or a school mail system[14] or a governmental fund drive.[15] The "purposes" for which the forum may be used in this case — "social, civic," etc — are basically broad and unrestricted and not dissimilar to those Lamb's Chapel proposes. Except for commercial and religious speech, virtually any type of speech activity (even politics) is permitted. As was recognized in a similar case with a contrary result: "the Constitution forbids a

[11] *Adderley v. Florida*, 385 U.S. 39 (1966).

[12] *Greer v. Spock*, 424 U.S. 828 (1976).

[13] *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976).

[14] *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37 (1983).

[15] *Cornelius v. NAACP*, 473 U.S. 788 (1985).

state to enforce unconstitutional exclusions from a forum *generally open* to the public, even though the forum was not required to be open in the first place." *Gregoire v. Centennial School District*, 674 F. Supp. 172 (E.D. Pa. 1987), *aff'd*, 907 F.2d 1366 (3d Cir. 1990)(emphasis added).

Notwithstanding the Second Circuit's facile distinctions, the nature of the forum in this case rivals the "open public forum" found in *Widmar v. Vincent*, where the University of Missouri at Kansas City mistakenly argued that the Establishment Clause required the exclusion of religious gatherings on campus.[16] These arguments, as they relate to this case, are discussed next.

4. The Establishment Clause as A Compelling State Interest To Deny Access For Religious Programs.

New York alleged in the District Court below that its ban on religious meetings in public school facilities is required by the Establishment Clause. Although the same arguments were advanced in the *Widmar* case, the proper analytical approach was framed by Justice Lewis F. Powell, Jr., in the *Widmar* majority opinion:

> The question is *not* whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and *the question is whether it can now exclude groups because of the content of their speech*....In this text, we are unpersuaded that the primary effect of the

[16] The Second Circuit's contention that *Widmar*'s holding is narrow and limited to a university setting is a position that does not appear to be shared by this Court, as its most recent pronouncements concerning the Establishment Clause have made evident. For example, in *Mueller v. Allen*, 463 U. S. 388, 398-399 (1983), this Court cited *Widmar* for the proposition that a program that neutrally provides state assistance to a broad spectrum of citizens is "not readily subject to challenge under the Establishment Clause." *Cf. Corporation of Presiding Bishop v. Amos*, 483 U. S. 327 (1987); *Bowen v. Kendrick*, 487 U. S. 589 (1988).

> public forum, open to all forms of discourse, would be to advance religion.

Id. at 273 (emphasis added). The *Widmar* analysis, properly framed, makes clear that an "equal access" policy [is not necessarily] incompatible with [the Supreme Court's] Establishment Clause cases." 454 U. S. at 271. Such a policy does not "offend" the Establishment Clause" if it passes the tri-partite test of *Lemon v. Kurtzman*, 403 U. S. 602, 612-614 (1971): (1) the legislature must have adopted the law with a secular purpose; (2) the statute's primary effect must be one that neither advances nor inhibits religion, and (3) the law must not result in an excessive entanglement of government with religion. If the policy fails to comply with any one of these elements, it constitutes an impermissible establishment of religion.

With regard to the question of secular purpose, by granting access to a wide range of activities and purposes, the State is obviously not fulfilling or advancing a nonsecular purpose. It is providing a place for community life to flourish, with all of the concomitant benefits. The more important question is the policy's "primary effect" and whether it impermissibly advance or inhibits religion. In *Widmar*, this Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U. S. at 273. Justice Powell pointed out that it was possible, even foreseeable, that religious groups might actually benefit from use of the facilities, but this was determined to be an "incidental," and not a primary, advancement of religion.[17] Two factors were deemed

[17] *Citing Committee on Religious Liberty v. Nyquist*, 413 U. S. 756, 771 (1973); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1973); *McGowan v. Maryland*, 366 U. S. 420 (1977). It has been pointed out that by renting school facilities, religious groups merely share benefits with all community groups. "If religious groups benefit, it is in spite of, rather than because of, their religious character." *Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983).

important to show that the benefit to religion from use of the state facilities by religious groups would be "incidental": (1) "an open forum policy in a public university does not confer any imprimatur of State approval on religious sects or practices;" (*Widmar*, 454 U. S. at 274) and (2) "the forum is available to a broad class of nonreligious as well as religious speakers...." (*Id.*).

These factors are evident in the present case. First, the vigorous tradition of advocacy and robust speech in our culture presumes general knowledge among the citizenry of the openness of public facilities for multiple community uses. As in *Widmar*, the actual use of school facilities by a broad spectrum of groups carries with it "an important index of secular effect." 454 U. S. at 274. Moreover, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Board of Education v. Mergens*, 496 U. S. 226, ____, 110 S.Ct 2356, 2371(1990). And any concern about official sponsorship would be much less evident where a school facility is used after hours on a temporary basis at night or on a weekend where, at most, the only school personnel on the premises, if any, are custodial personnel. "[T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Board of Education v. Mergens*, 496 U. S. at ____, 110 S.Ct. at 2372.[18]

[18] The equal access, public forum rule is so logical and compelling that it was frequently followed by federal courts even *before* the Supreme Court's decision in *Widmar*. Pursuant to this rule, courts have directed school boards to make school facilities available to outside groups during nonschool hours even though the boards considered the groups reprehensible. *See, e.g., Lawrence University Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F. Supp. 1319 (1976); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), 643 F.2d 1034 (1981), *vacated*, 102 S. Ct. 626 (1981); *on remand*, 679 F.2d 64 (5th Cir. 1982); *cf. O'Hair v. Andrus*, 613 F.2d 931 (D. C. Cir. 1979).

There is an additional consideration. The "primary effect" prong of *Lemon* requires that the state policy not *inhibit* religion. The primary effect of singling out religion for special discrimination *vis-a-vis* nonreligion is to *inhibit* religion. As Professor Tribe has pointed out, "[a] message of *exclusion*. . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups." L. Tribe, *American Constitutional Law* 1175(2d.ed.1988). New York's discriminatory rule thus itself fails to satisfy the Establishment Clause requirement that government remain *neutral* toward religion.

Finally, as for entanglement, the state's prohibition on uses for religious purposes is fraught with more entanglement questions that if religious uses were permitted. As this Court noted in *Widmar*:

> [t]he University would risk *greater* "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. There would also need be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U. S. at 272, n. 11 (emphasis added).

In short, there is no Establishment Clause violation here that would justify the content-based exclusion of the Free Speech rights of persons who wish to espouse religious views.

III. THE GENERALLY WORDED PROSCRIPTION CONTAINED IN THE SCHOOL BOARD POLICY FAILS TO GIVE PERSONS SEEKING ACCESS TO SCHOOL FACILITIES FAIR WARNING ABOUT THE KINDS OF EXPRESSION THAT

WERE PERMITTED, AND OWING TO ITS INCURABLE LACK OF STANDARDS, IT IS SUBSTANTIALLY OVERBROAD AND UNCONSTITUTIONALLY VAGUE AND IMPERMISSIBLY VESTS STANDARDLESS AUTHORITY IN PUBLIC OFFICIALS.

It is respectfully submitted that the "no religious purpose" policy in the present case does not provide sufficient guidance or warning to Lamb's Chapel or Pastor Steigerwald or, for that matter, to any other person as to what "uses" might contain prohibited religious "purposes" and those "uses" that would not. On its face, the policy prohibits use "by any group for religious purposes." *Lamb's Chapel*, 959 F.2d at 387. Presumably even religious groups could use school facilities for "social or civic purposes", but would be excluded for "religious purposes." But would, for example, the film series on the family "Turn Your Heart Toward Home" qualify as a "social" or "civic" use rather than a "religious" use? The Third Circuit has pointed out in a similar case, that "[t]he term "civic" can be stretched or contracted to fit whatever the school district decides" (*Gregoire v. Centennial School District*, 907 F.2d at 1374-75) and no doubt the word "social" can be stretched even further. It is thus difficult to determine how the School Board Clerk could discern that the "Turn Your Heart Toward Home" film series was sufficiently religious to be banned, whereas the Salvation Army Band Benefit Concert and the Southern Harmonizer's Gospel Concert were not. And how would the Clerk treat a "God and Country" rally with strong political overtones — would it serve a religious purpose, or a political one and, if both, would it necessarily be excluded? In light of such irreconcilable inconsistencies, and notwithstanding the facile distinctions drawn by the Second Circuit, it is not possible for ordinary citizens to know what is permitted or not permitted. Nor is it clear who will decide what is covered by the policy and by what standard.

The lack of standards and the total discretion vested in the official enforcing the school board policy unfortunately also "has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, ____ U. S. at ____, 112 S. Ct. 2395, 2401 (1992), *citing Heffron v. ISKCON*, 452 U. S. 640, 649 (1981). The chilling effect from potential arbitrary enforcement that inevitably results from such standardless discretion cannot be avoided. *See, City of Lakewood v. Plain Dealer Publishing Company*, 486 U. S. 750, 755-769 (1988). The no religious "purposes" policy falls within the four corners of *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). There, the Board of Commissioners of Los Angeles International Airport sought to ban all speech in the airport terminal except expressive activity "related" to airport purposes. Here, the policy bans all uses for "religious purposes." This Court found fault with excluding speech under such undefined and unprincipled "standards:"

> Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be "airport-related," but is still protected speech *even in a non-public forum. See Cohen v. California*, 403 U.S. 15 (1971). Moreover, the vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the travelling public to "pass the time." ...We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who tries to "pass the time" by distributing leaflets to fellow travellers.

> In essence, the result of this vague, limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Lewis v. City of New Orleans*, 415 U.S. 130, 135-136 (1974) (Powell, J. concurring). *See also, Houston v. Hill*, 482 U. S. 451, 465 (1987); *Kolender v. Lawson*, 461 U. S. 352, 358 (1988). (Emphasis supplied.)

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U. S. at 576 (1987). This is precisely the kind of murky decision-making that this Court has found infirm as a matter of law because "the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Id.*

IV. THE POLICY IMPOSES A PRIOR RESTRAINT ON SPEECH WITHOUT ADEQUATE CONSTITUTIONAL SAFEGUARDS AND IS THEREFORE UNCONSTITUTIONAL.

The respective State and local policies governing public use of the school facilities imposed a *prior restraint* on Lamb's Chapel's and Pastor Steigerwal's free speech. The policy is invalid because it reserves to a school board official the right to review materials as to their suitability for use in the forum and constitutes a prior restraint on speech.

Although all prior restraints are not unconstitutional *per se*[19], *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, n. 10

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[19] Time, place and manner restrictions, if specifically and narrowly drawn so as to preclude the exercise of content control, may be upheld. *See*, M. Nimmer, *Nimmer on Freedom of Speech*, Sec. 4.06[B] (Student Ed. 1984).

(1963), "[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity." *Id.*; *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980)(per curiam); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)(per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Indeed, the "presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975). Our jurisprudence imposes this burden on public officials because of "[o]ur distaste for censorship - reflecting the natural distaste of a free people - [which] is deep-written in our law." *Id.* at 553.[20]

A central feature of prior restraint analysis concerns whether the government body granting approval for expressive activity within a given forum has unbridled discretion over the forum's use. A prior restraint is regarded as impermissible if approval by the government is "not a matter of routine" but involves "appraisal of facts, the exercise of judgment and the formation of an opinion by the [government body]." *Southeastern Promotions*, 420 U.S. at 554. The judgment as to the "religiosity" of particular programs — as is readily evident from the Second Circuit's analysis of the film series and the Salvation Army Band and Southern Harmonizer's Gospel Con-

[20] *See also Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984) (transit authority's refusal to lease artist space to display in its subway stations poster critical of Reagan administration was clear-cut and impermissible prior restraint); *Community for Creative Non-Violence v. Turner*, 714 F. Supp. 29, 32-33 (D.D.C. 1989) (transit authority regulation requiring all persons seeking to engage in "free speech activity" on the transit authority's property obtain permit from central business office held facially invalid since it created an impermissible prior restraint on free speech).

certs —is subjective in the extreme, and readily "lacks sufficient safeguards, including neutral criteria for decisionmaking, to 'obviate the dangers of a censorship system.'" *Id., quoting Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

The dangers posed by administrative discretion and indefinite standards have been emphasized time and again by this Court. As mentioned above, it has consistently struck down permit or license cases in which unconstrained executive or administrative discretion has effectively denied a plaintiff use of public places to engage in expressive activity. The lesson of numerous older decisions was summarized in *Niemotko v. Maryland*, 340 U.S. 268 (1951), in which the Court said:

> In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a *prior restraint* on freedom of speech, press and religion, and, *in the absence of narrowly drawn, reasonable and definite standards for the officials to follow* must be invalid.

Id. at 271 (emphasis added). The same concern was addressed in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), in which the Court struck down a law authorizing denial of a parade permit whenever city officials deemed that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." *Id.* at 140-50. The Court found this law defective because it failed to provide "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 151. More recently, in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court held that the refusal of a municipal board to permit the performance of the rock musical "Hair" in a municipal auditorium, characterized by the Court as a public forum, amounted to a prior restraint in violation of the First Amendment. On the basis of

indirect reports, the board concluded that the production would not be "in the best interest of the community." The elements of prior restraint were implicated because the "board was empowered to determine whether the applicant should be granted permission — in effect, a license or permit - on the basis of its review of the content of the proposed production." *Id.* at 554. Lacking "precise and clear standards," the board's exercise of authority to bar the musical performance was invalidated.

Clearly, the school board's written policy prohibiting, without standards, "use" of public school facilities for "religious purposes" succumbs to the same Constitutional infirmity. The school board's action imposing a bar on Lamb's Chapel's and Pastor Steigerwald's film series "in advance of actual expression," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), only highlights the clear-cut prior restraint upon their protected speech. The record suggests that the bar from the school facilities implicates an "appraisal of facts, the exercise of judgment, and the formation of opinion" by school board personnel and thus indicates an impermissible prior restraint. *Southeastern Promotions, Ltd.*, 420 U. S. at 554.

The school board's practice here, which is in essence part and parcel of an overall license scheme, requires an analysis of the *content* of a proposed use to determine whether it will advance a "religious purpose." The policy offers no precise and clear standards to guide school authorities in determining whether the proposed use falls under the terms of the policy.

> A licensing system need not effect total suppression in order to create a prior restraint. In *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968), it was observed that the evils attendant on prior restraint "are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as "suitable for young persons" or "not suitable for young persons." The "not suitable" films were not suppressed, but exhibitors were required to have special licenses and to advertise their classification in order to show them...

Southeastern Promotions, Ltd., 420 U.S. at 556 n.8. A system which relies on vaguely defined classifications and definitions poses a substantial danger to the exercise of free speech by persuading or intimidating prospective speakers to modify their speech in order to avoid less favored classifications and attendant regulations. It is respectfully submitted that the New York policy, on its face, constitutes a prior restraint on speech insofar as it vests standardless and unbridled discretion in school officials who must decide which uses have "religious purposes." The Second Circuit's own extensive, but unpersuasive, analysis attempting to distinguish the Lamb's Chapel film series from other religious uses that have been permitted only shows that the policy is readily susceptible to personal predilections and sensitivities, whether it be the sensitivity of the school board clerk, the sensitivity of the judge or jury, the "sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." *Coates v. Cincinnati*, 402 U.S. 611, 613 (1971). For this reason, and because the policy could be applied in a manner that constitutes a prior restraint, the policy should be declared invalid.

The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. at 58. This Court has held that a system of prior restraint runs afoul of the First Amendment if it lacks specified procedural safeguards:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must

> rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd., 420 U.S. at 560. *See generally* M. Nimmer, *supra*, Sec. 4.05; L. Tribe, *American Constitutional Law* 1059-61 (2d ed. 1988).

In the case *sub judice*, the school system's absolute restraint on the film series lacked all of these safeguards. First, total suppression of Lamb's Chapel's and Pastor Steigerwald's speech was accomplished "by a single stroke of the pen." At that point, the burden fell to the would-be speaker, Lamb's Chapel and its Pastor, to vindicate their rights through the present costly and burdensome legal action. *See* Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 422 (1983). It should also be noted that those suppressing their speech operated in the relative informality of an administrative procedure substantially shielded from effective public scrutiny and participation. Second, the absolute restraint imposed by New York provides no mechanism for prompt judicial review.[21] The school board policy lacks adequate procedural safeguards and fails to meet any of the procedural safeguards specified by the Court in *Southeastern Promotions, Ltd.* as essential to ensure the constitutionality of a prior restraint.

It is of no consequence to prior restraint analysis that Lamb's Chapel or Pastor Steigerwald may have used this or some other public or private forum to express their views. Even if another public or private forum had been available, that fact

[21] In particular, the vague and standardless language of the school policy is subject to constitutional challenge. Where government discretion cannot effectively be constrained by narrow, precise and objective guidelines, this Court has required that its exercise of authority be closely supervised by judicial authority. These policies clearly offer no provision for judicial review. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

alone would not justify an otherwise impermissible prior restraint. *See Southeastern Promotions*, 420 U.S. at 556. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

V. NEW YORK'S DENIAL OF BENEFITS FOR RELIGIOUS REASONS CONSTITUTES INVIDIOUS DISCRIMINATION AGAINST LAMB'S CHAPEL AND ITS PASTOR IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

When fundamental and personal rights are at stake, this Court has subjected state classification of persons and objects to strict scrutiny. In the early case of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), this Court recognized that laws involving the rights to vote, restraints on free speech, interferenced with political organizations, freedom of assembly, *and discrimination against religious*, national or racial *minorities*, require a "more searching judicial inquiry" under the Equal Protection Clause.

Since that time, the Court has identified certain classifications as "suspect" and others involving "fundamental rights," both of which are subjected to "strict scrutiny" by the Court and require a showing that there is a compelling state interest "necessary to the accomplishment of some permissible state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Classification in the area of race, *religion* and nationality have been deemed suspect because they affect discrete and insular minorities.[22]

[22] *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Likewise, even though a law may be designed to serve neutral ends, if it is applied in a manner to discriminate on otherwise impermissible constitutional grounds, or if its impact or effect constitutes an equal protection violation, then the statute as applied may be held unconstitutional. The classic statement of this principle was in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, the supervisors of the County and City of San Francisco were empowered in their discretion to regulate the operation of laundries in wooden buildings, while laundries operating in brick or stone structures were not subject to regulation. Consent to operate wooden laundries was given to non-Chinese subjects, but withheld from Chinese subjects. The Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-374.

The equal protection principals set forth above clearly apply in the context of a public forum case, as well as in a public benefit case like this one, where persons are denied important public benefits granted to others without restriction. Thus, in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), a statute that prohibited picketing except for labor disputes was invalidated on Equal Protection grounds because of its unequal treatment of the subject matter of speech. And as recently as *Zobel v. Williams*, 457 U.S. 55 (1982), this Court recognized that "when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 60. Because the discrimination here is based on the traditional

"suspect" class of *religion*, the distinction is subject to strict scrutiny and the state must demonstrate a compelling state interest for the distinctions that have been drawn between beneficiaries.

In this regard, *Widmar v. Vincent*, 454 U.S. 263 (1981), continues to be helpful as a framework for analysis, as does the case of *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). In those cases, it was demonstrated that the state's attempt to comply with what it believed were its Establishment Clause obligations failed to provide a sufficiently compelling state interest (let alone a rational basis) to justify the discrimination imposed against the students in question. *Id.* at 276.

In order for Establishment Clause obligations to be considered compelling in the present case, New York must show, as in *Widmar* and *Witters*, that a public benefit program *without* a religious exclusion would violate the tripartite test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Applying this test, it is clear as discussed above, that the Establishment Clause does *not* compel New York to draw the distinction against religious use that it has drawn.

CONCLUSION.

The context of the public property in this case is in the nature of a designated public forum in which citizens are free to engage in speech activities on public school facilities, subject only to reasonable time, place and manner restrictions. Although New York purports to exclude the use of the school facilities for "religious purposes," the validity of the latter restriction must be considered in the context of the overall policy which grants near universal access to school facilities, but excludes only religious and commercial purposes. In these circumstances, the state may not censor or draw distinctions with

respect to the content of speech except under very stringent limitations which are not satisfied here.

Under the rhetorical mask, of "use," "genre" and "purpose," the Second Circuit would permit New York to unduly suppress and banish religious speech or exercise from the public square, subjecting religious persons to a *de facto* regime of *religious apartheid.* Apart from the obvious invidious implications of such a policy, it should not be permitted if only because "[t]hose who won our independence knew that the 'path of safety' lies in free discussion." *Whitney v. California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). The logic of the position of the State of New York unfortunately runs contrary to this central historical and political truth. The exclusion of religious topics from otherwise open public forums is not only not mandated, it is not permitted, by the Constitution, nor should it be. As U.S. Circuit Judge Harold Leventhal observed in another case where Free Speech and Establishment Clause interests clashed: "[t]he Establishment Clause is not an abstraction in logic. It permits an accommodation in furtherance of the spirit and purpose of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 937 (D. C. Cir. 1979).

For these compelling reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

November 18, 1992

Respectfully submitted,

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